Supreme Court, U.S.
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92-317

No. _____

In The

Supreme Court of the United States

October Term, 1992

CARLOS C. VICARIA, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED

Title 18 U.S.C. § 3731 allows the United States to appeal to a court of appeals an order of a district court granting a new trial after verdict. In the instant case, the United States Court of Appeals for the Eleventh Circuit held that a district court is divested of jurisdiction to empanel a jury after the United States has initiated an appeal pursuant to § 3731. The question presented is:

> Is the district court divested of jurisdiction to proceed with a new trial after the United States has initiated an appeal pursuant to § 3731 of the district court's order granting a new trial?

PARTIES TO THE PROCEEDING

The parties are those named in the caption. In compliance with Supreme Court Rule 28.1, petitioner has no parent companies, non-wholly owned subsidiaries, or affiliates.

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Federal Rule of Appellate Procedure 8(a) 1

The petitioner, Carlos C. Vicaria, M.D., respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on May 18, 1992.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, dated May 18, 1992, which appears in the appendix hereto at App. 1-9, *infra*, is reported at *United States v. Vicaria*, 963 F.2d 1412 (11th Cir. 1992).

The opinion of the United States Court of Appeals for the Eleventh Circuit, dated May 11, 1992, which appears in the appendix hereto at App. 10-11, *infra*, is unreported.

The Order of the United States District Court for the Middle District of Florida, which appears in the appendix hereto at App. 12, *infra*, is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (Supp. 1992). The decision of the circuit court, reversing the order of the district court, was entered May 18, 1992. The time within which to apply for certiorari thus runs from that date and expires on August 17, 1992.

The jurisdiction of the circuit court of appeals was invoked by the United States presumably under Federal Rule of Appellate Procedure 8(a).

The jurisdiction of the district court was invoked under 18 U.S.C. § 3231 (Supp. 1992).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 18 U.S.C. § 3731 (Supp. 1992):

§ 3731. Appeal by United States

In a criminal case, an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for

revocation of, or modification of the condition of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment, or order has been rendered and shall be diligently prosecuted.

The provision of this section shall be liberally construed to effectuate its purposes.

2. U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On December 11, 1991, a jury returned a verdict of guilty on four counts against petitioner, who filed timely Motions for New Trial and Judgment of Acquittal on December 18, 1991. The district court held a hearing on the Motions on March 9, 1992, and orally granted the Motion for a New Trial at the hearing. An entry memorializing the grant of the Motion for a New Trial was made on the district court's docket on March 9, 1992. The district court reduced to writing an Order Granting a

New Trial which was dated March 19, 1992, and docketed on March 23, 1992.

The United States filed a Motion for Reconsideration of the Order Granting a New Trial on March 23, 1992, which motion was docketed 43 minutes prior to the district court's written Order Granting a New Trial.

On May 11, 1992, the district court entered a written Order finding the United States' Motion for Reconsideration to be moot. The basis of the district court's May 11, 1992, order was that the United States' Motion for Reconsideration was filed prematurely, as it was docketed prior to the entry of the district court's Order Granting a New Trial. The district court ruled that the subsequent Order Granting the Motion for a New Trial acted as a denial of the Motion for Reconsideration.

The United States immediately filed a Notice of Appeal pursuant to 18 U.S.C. § 3731 and an Emergency Motion to Stay the Retrial. The district court considered the Notice of Appeal untimely pursuant to § 3731 and Federal Rule of Appellate Procedure 4(b) because more than 30 days had elapsed since the Order Granting a New Trial (and thereby denying the Motion for Reconsideration) was docketed on March 23, 1992.

On May 11, 1992, the district court empaneled a jury and the trial commenced. Later the same day, the United States Court of Appeals for the Eleventh Circuit granted the United States' Emergency Motion to Stay the Retrial, ordered the trial temporarily recessed, and directed the parties to address certain issues. Since the district court

had already empaneled a jury, among the issues mentioned by the Eleventh Circuit was whether a question of double jeopardy was presented.

On May 18, 1992, the Eleventh Circuit issued its decision granting the United States' Motion to Stay proceedings in the district court pending the United States' appeal of the grant of the Motion for a New Trial. The Eleventh Circuit held that the United States' Notice of Appeal of May 11, 1992, was timely filed, thereby divesting the district court of jurisdiction.

Petitioner seeks review of the Eleventh Circuit's judgment which held that the district court was divested of jurisdiction upon the United States filing its Notice of Appeal pursuant to 18 U.S.C. § 3731.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's Holding That A District Court Has No Jurisdiction To Act After The United States Has Filed A Notice of Appeal Pursuant To 18 U.S.C. § 3731 Is In Direct Conflict With Decisions Of The United States Court Of Appeals For the Ninth Circuit

The Eleventh Circuit's holding that the United States' filing of a Notice of Appeal pursuant to § 3731 seeking review of an Order Granting a New Trial divests the district court of jurisdiction to proceed with a new trial is (1) in direct conflict with the decisions of the United States Court of Appeals for the Ninth Circuit, and (2) is an important question of federal law which has not, but which should be, settled by this Court.

In holding that a § 3731 Notice of Appeal divests the district court of jurisdiction to act, the Eleventh Circuit adhered to the traditional inflexible view that the filing of any Notice of Appeal divests the district court of jurisdiction to empanel a jury and proceed with the retrial. *United States v. Vicaria*, 963 F.2d 1412, 1415 (11th Cir. 1992). "Section 3731 appeals, however, are not usual." *United States v. Gatto*, 763 F.2d 1040, 1049 (9th Cir. 1985). The traditional "divestiture" rule does not apply to § 3731 appeals. Rather, "a decision as to whether jurisdiction exists in a trial or appellate court, or both, can be the product of a reasoned choice." *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980).

In direct conflict with the Eleventh Circuit's strict "divestiture" rule, the United States Court of Appeals for the Ninth Circuit has applied a balancing test to determine whether the district court maintains jurisdiction to act in a case in which a § 3731 Notice of Appeal has been filed. *United States v. Gatto*, 763 F.2d 1040 (9th Cir. 1985). In *Gatto*, the district court granted the defendant's motion to suppress evidence. The United States filed a Notice of Appeal pursuant to § 3731 seeking review of that suppression order. Subsequently, the district court entered its order dismissing the indictment for the United States' failure to prosecute. The United States appealed the Notice of Dismissal arguing that the district court had no jurisdiction to enter such an order after the filing of the § 3731 Notice of Appeal. The Ninth Circuit affirmed the Order of Dismissal upon holding that the district court had jurisdiction to enter said order. The basis of its holding was the United States' conditional right to seek § 3731 appellate review must be balanced with the defendant's

right to proceed to trial. This, the court held, can best be accomplished by retaining jurisdiction in the district court. *Gatto*, 763 F.2d at 1950.

Upon holding that a district court does have jurisdiction to act even after a § 3731 Notice of Appeal has been filed, the *Gatto* court relied on a previous decision of the Ninth Circuit in *United States v. Cox*, 475 F.2d 837 (9th Cir. 1973). In *Cox*, the Ninth Circuit held that a § 3731 appeal does not divest the district court of jurisdiction to continue with the trial proceedings. The court held that the guarantee of a speedy trial within the Sixth Amendment of the United States Constitution must be taken into consideration when determining whether the trial court is divested of jurisdiction under such circumstances. *United States v. Cox*, 475 F.2d at 841. Indeed, this Court has recognized that a § 3731 appeal may abridge a defendant's Sixth Amendment speedy trial rights:

> . . . delays in bringing the case to trial caused by the Government's interlocutory appeal may be weighed in determining whether a defendant has suffered a violation of his rights to a speedy trial.

United States v. Loud Hawk, 474 U.S. 302, 316 (1986).

Pursuant to the rule of the Ninth Circuit, and as supported by the previous decisions of this Court, the determination of whether a trial court may take action in a proceeding after the filing of § 3731 Notice of Appeal must be made upon balancing of factors including the defendant's constitutional speedy trial rights. The Eleventh Circuit in its instant decision actually recognized *Gatto* and *Cox* as instances where a district court is not

divested of jurisdiction after the filing of a § 3731 appeal. *United States v. Vicaria*, 963 F.2d at 1415 n.2. The Eleventh Circuit, however, rather than acknowledging the conflict between the decisions of the Ninth Circuit and its own decision, referred to the Ninth Circuit decisions as mere "exceptions" to its own general "divestiture" rule. *Id.*

Notwithstanding the Eleventh Circuit's characterization of those cases, the decision of the Eleventh Circuit is in irreconcilable conflict with the decisions of the Ninth Circuit. That conflict can only be resolved by plenary consideration of the matter by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2450

D.C. Docket No. 91-174-CR-T-10C

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CARLOS C. VICARIA, M.D., ET AL.,

Defendant-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 18, 1992)

Before KRAVITCH, EDMONDSON and BIRCH, Circuit Judges.

PER CURIAM:

This case comes before us on the government's emergency motion to stay district court proceedings pending its appeal of the district court's grant of a new trial to Carlos Vicaria ("Vicaria"). In our May 14, [sic] 1992, order, we determined that the government's notice of appeal was timely, and we granted the motion for the stay. This opinion follows. We hold that (1) the government's motion for reconsideration of the district court's grant of a new trial tolled the time limit for filing a notice

of appeal even though the motion was filed before the written order granting the new trial was entered in the criminal docket; and (2) the government's timely filing of its notice of appeal vested jurisdiction in this court and divested the district court of jurisdiction.

BACKGROUND

On December 11, 1991, a jury returned a verdict of guilty against Vicaria on four counts for his role in a cocaine distribution conspiracy. Vicaria filed a timely motion for new trial and a motion for judgment of acquittal on December 18. The district court held a hearing on the motions on March 9, 1992, and orally granted the motion for new trial at that time. An entry memorializing the grant of the new trial motion was entered on the district court's docket on that same day.

In a subsequent order dated March 19, the district court reduced to writing its order granting a new trial. On March 23, the government filed a motion for reconsideration of the order. Forty-two minutes after the government's motion was docketed, the district court's March 19 written order granting the new trial was also entered in the docket. Vicaria filed a response to the motion for reconsideration on April 6, and the government filed a notice of supplemental authority on May 5.

On May 11, in response to the government's request for a ruling on its pending motion for reconsideration, the district court entered a written order finding that the government's motion was premature because it had been docketed forty-two minutes before the new trial order was docketed. In the district court's view, its order

granting a new trial, dated March 19, was tantamount to a denial of the motion for reconsideration, which was dated March 23. Alternatively, according to the district court, the motion for reconsideration of the order was moot because it was filed before the order was entered in the docket. The court therefore held that any further ruling on the motion for reconsideration was unnecessary and ordered that the new trial would commence at once. The government immediately filed a notice of appeal pursuant to 18 U.S.C. § 3731 and an emergency motion to stay the retrial. The district court expressed the view that this notice of appeal was not timely filed in accordance with section 3731 and Fed.R.App.P. 4(b) because more than thirty days had elapsed since its order granting a new trial was docketed on March 23. The court refused to delay the trial and immediately impaneled a jury.

On the same day, May 11, this court ordered that the trial be temporarily recessed until Friday, May 15, and directed the parties to address certain jurisdictional issues.

DISCUSSION

Although a motion for reconsideration of a district court order in a criminal action is not expressly authorized by the Federal Rules of Criminal Procedure, the Supreme Court has held that the timely filing of such a motion in a criminal action tolls the time for filing a notice of appeal and the time begins to run anew following disposition of the motion. *See United States v. Dieter,* 429 U.S. 6, 8-9, 97 S.Ct. 18, 19-20, 50 L.Ed.2d 8 (1976); *United States v. Healy,* 376 U.S. 75, 84 S.Ct. 553, 11 L.Ed.2d

527 (1964). A motion for reconsideration in a criminal case must be filed within the period of time allotted for filing a notice of appeal in order to extend the time for filing the notice of appeal. *See United States v. Russo*, 760 F.2d 1229, 1230 (11th Cir. 1985). Therefore, in a criminal case, the government has thirty days in which to seek reconsideration of a final judgment or other appealable order. *See* 18 U.S.C. § 3731; Fed.R.App.P. 4(b). In *United States v. Millian-Rodriguez*, 759 F.2d 1558, 1562 n.1 (11th Cir. 1985), *cert. denied*, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 112 (1985), this court stated:

> The case law clearly establishes that the timely filing of a motion for rehearing can render the dismissal of an indictment non-final, and extend the period during which an appeal may be taken, regardless of whether such extension is explicitly sanctioned by any statute or rule. In such cases the period of limitation runs from the date on which the motion for rehearing is denied . . . .

Accordingly, if the government's motion for reconsideration in this case was timely and proper, the appeal period did not begin to run until the district court disposed of the motion.

Vicaria argues that the district court correctly found that because its March 19 written order granting a new trial was docketed minutes after the government's March 23 motion for reconsideration of the self-same order, either (1) the March 19 written order in effect denied the March 23 motion for reconsideration, or (2) the motion for reconsideration was moot because it was filed before

the order was entered in the docket. Under either analysis, according to the district court, (1) the timely appeal clock started to run on March 23 and ran out on April 22, (2) the May 11 notice of appeal was not timely filed, and (3) the district court was thus not divested of jurisdiction.

Clearly, however, the district court's March 19 order could not have addressed a motion that was not filed until March 23. Further, the fact that the written order was docketed a few minutes after the government's motion for reconsideration is of no consequence because the government's motion was properly directed to the court's oral announcement of its grant of the motion for a new trial on March 9. Rule 4(b) states that the government's "notice of appeal shall be filed in the district court within 30 days *after* the entry of . . . [the] order . . . . A[n] . . . order is entered within the meaning of this subdivision when it is entered in the criminal docket." (Emphasis added.) Rule 4(b) also, however, states that "a notice of appeal filed after the announcement of a[n] . . . order but *before* entry of the . . . order *shall be treated as filled after such entry and on the day thereof. . . .* " (Emphasis added.)

In other words, for purposes of determining whether a party has filed an appeal within the prescribed time limit – ten days for the defendant and thirty days for the government – Rule 4(b) provides that the clock begins to run when the order is entered in the criminal docket. This does not mean, however, that a party may not appeal an order before the order's entry in the docket. As quoted above, in such a situation, the notice of appeal "shall be

treated as filed after such entry and on the day thereof."[1] *See also* 9 Moore's Federal Practice ¶ 2.04.03 & n.15 (2d ed. 1992). Therefore, under the express terms of Fed.R.App.P. 4(b), the government was entitled to file a notice of appeal from the district court's grant of Vicaria's motion for a new trial or to file a motion for reconsideration directed at that ruling as soon as the district court announced it.

On March 9, the district court stated from the bench:

> Well, on reflection and reading over the instructions, I think that the Court should have instructed the Jury on that theory of his defense.

---

[1] One could argue that when the passages in Rule 4(b) are read in context, the provision allowing the filing of a notice of appeal before the entry of the order applies only to the defendant, whereas the passage stating that an order is entered when it is entered in the criminal docket applies only to the government. Such a reading would come from the fact that the former passage directly follows a discussion of the defendant's notice of appeal while the latter passage directly follows a discussion of the government's notice of appeal. Although the placement of the passages may at first glance seem confusing, the proper reading of Rule 4(b) is that each sentence that does not apply expressly to one particular party applies to both parties. For instance, following the discussion of the government's notice of appeal, Rule 4(b) states that "[u]pon a showing of excusable neglect the district court may . . . extend the time for filing a notice of appeal . . . . " According to context, one might think that only the government may extend its time for appeal for excusable neglect. In reality, though, both the defendant and the government may receive an extension of the time to file a notice of appeal for excusable neglect. *See, e.g., United States v. Rothseiden*, 680 F.2d 96, 98 (11th Cir. 1982) ("This provision by its terms applies to both appeals by the defendant and the government.").

> Since I didn't do that, I'm going to grant a new trial in the case. If you [defense counsel] will prepare an appropriate order.

The district court criminal docket entry for March 9 read:

> PROCEEDINGS of Sentencing before Judge Anthony Alaimo. Arguments on previous motions for new trial & judgment of acquittal. Motion for New Trial GRANTED. C/R Judith Felker (CARLOS VICARIA)

The district court's statement from the bench was an announcement of its order granting a new trial. *See United States v. Presser*, 844 F.2d 1275, 1280 (6th Cir. 1988) (holding that oral statement by district court "evidencing an intent to exclude government evidence" qualifies as an appealable order under section 3731). Accordingly, the March 23 motion for reconsideration (1) was timely filed within thirty days of the March 9 announcement of the order granting the motion for a new trial and (2) tolled the time for filing a notice of appeal. The district court's March 19 written motion did not dispose of the government's March 23 motion for reconsideration. The district court did not deny the government's motion until May 11, when the district court issued its order erroneously stating that it had denied the motion in its March 19 order. Therefore, we hold that the government's May 11 notice of appeal was timely filed within thirty days of the court's order of the same day.

The government's timely filing of a notice of appeal in this case divested the district court of jurisdiction before it impaneled the jury. *See United States v. Rogers*, 788 F.2d 1472, 1475 (11th Cir. 1986) ("The filing of a notice of appeal

normally divests the district court of jurisdiction over matters concerned in the appeal and transfers jurisdiction over those matters to the court of appeals.").[2]

Addressing a factual situation nearly identical to the one before us now, the Tenth Circuit in *United States v. Mavrokordatos*, 933 F.2d 843, 846 (10th Cir. 1991), held that when "[t]he government filed its notice of appeal from an appealable order at 1:51 p.m. and the jury was impaneled and sworn at approximately 4:10 p.m.. . . . the notice of appeal pursuant to 18 U.S.C. § 3731 was effective, and the trial court was thereby divested of jurisdiction to proceed before the jury was sworn."

CONCLUSION

For the foregoing reasons, we hold that the government's notice of appeal was timely filed, vesting jurisdiction

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[2] Under limited exceptions to the general rule, the filing of a notice of appeal does not divest the district court of jurisdiction. *See, e.g., Rogers*, 788 F.2d at 1475 (appeal of district court denial of a defendant's frivolous double jeopardy motion); *United States v. Hitchmon*, 602 F.2d 689, 691 (5th Cir. 1979) (en banc) (appeal of nonappealable order); *United States v. Gatto*, 763 F.2d 1040, 1049 (9th Cir. 1985) (holding that, in appropriate cases, when government appeals pretrial suppression order, district court retains jurisdiction to dismiss indictment because government's conditional right to appeal suppression order must be balanced against defendant's right to proceed to trial on the indictment); *United States v. Cox*, 475 F.2d 837, 841 (9th Cir. 1973) (holding that concern for defendant's Sixth Amendment speedy trial rights constituted justification for district court dismissing indictment during pendency of government appeal of suppression order). None of these exceptions applies here, however.

in this court and divesting the district court of jurisdiction. Accordingly, we grant the government's motion to stay any proceedings in the district court pending the government's appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2450

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CARLOS C. VICARIA, M.D., et al.,

Defendants-Appellees.

Appeal From the United States District court
for the Middle District of Florida

(Filed May 11, 1992)

Before KRAVITCH, EDMONDSON and BIRCH, Circuit Judges.

BY THE COURT:

This court has before it for consideration the motion of the Government to stay the trial of the above case in the United States District Court for the Middle District of Florida pending appeal. This Court orders as follows:

That the trial be temporarily recessed until Friday, May 15, 1992, at 9:00 a.m.

Each party, on or before Wednesday, May 13, 1992, at 12:00 noon, shall submit a memorandum brief not to exceed fifteen (15) pages addressing the following issues:

(1) whether the 30-day requirement for the Government to file a Notice of Appeal from the grant of a new trial in a criminal case, *see* 18 U.S.C. § 3731, was tolled by the delay of the Clerk of the District Court in docketing the March 19, 1992 order granting a new trial;

(2) assuming for the sake of argument that the 30-day requirement for the Government to file a Notice of Appeal was not tolled, whether, under 18 U.S.C. § 3731 and Fed. R. App. P. 4(b), the Government can still move the district court for an extension of the 30-day time requirement under Rule 4(b)'s excusable-neglect standard.

(3) whether, if a stay of the trial pending appeal on the merits is granted, a question of double jeopardy is presented.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
Plaintiff,	:	
V.	:	
CARLOS C. VICARIA, M.D., et al.,	:	
Defendants.	:	NO. 91-174-CR-T-23(C)

ORDER
(Filed May 11, 1992)

On March 23, 1992, at 11:36 A.M., this Court entered an Order granting the motion for new trial of defendant Carlos C. Vicaria, M.D. Approximately 42 minutes prior to entry of that Order, the Government moved for reconsideration of the Court's order granting Ficaria a new trial. Since the Government's motion to reconsider was filed prior to entry of the Court's Order granting a new trial, the Government's motion was filed prematurely. In this circumstance, the Court's subsequent Order granting the motion for a new trial is tantamount to and will be treated as the function equivalent of a denial of the motion to reconsider. Therefore, the Government's motion to reconsider was rendered **MOOT** as of March 23, 1992, and a separate order denying the Government's motion to reconsider is unnecessary.

SO ORDERED, this 11th day of May, 1992.

/s/ Anthony A. Alaimo
ANTHONY A. ALAIMO, JUDGE
UNITED STATES DISTRICT COURT

(2)

No. 92-317

Supreme Court, U.S.
FILED
OCT 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CARLOS C. VICARIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the government's filing of a timely notice of appeal from the district court's new trial order divested the district court of jurisdiction to commence retrial proceedings against petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-317

CARLOS C. VICARIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 963 F.2d 1412.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1992. The petition for a writ of certiorari was filed on August 17, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to import cocaine,

in violation of 21 U.S.C. 963; conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; importing cocaine, in violation of 21 U.S.C. 952(a); and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). A week after the verdict, on December 18, 1991, petitioner filed motions for a new trial and a judgment of acquittal. The district court held a hearing on the motions on March 9, 1992, and orally granted the motion for a new trial at that time.[1] An entry memorializing the grant of the new trial motion was recorded on the court's docket that same day. Pet. App. 2.

In a subsequent order dated March 19, the district court reduced to writing its order granting a new trial. The government filed a motion for reconsideration of the order on March 23. Forty-two minutes after the government's motion for reconsideration was docketed, the district court's March 19 written order granting the new trial was also entered in the docket. On April 6, petitioner filed a response to the reconsideration motion, and the government filed a notice of supplemental authority on May 5. Pet. App. 2.

On May 11, in response to the government's request for a ruling on its pending motion for reconsideration, the district court entered a written order finding that the reconsideration motion had been filed prematurely because it was docketed 42 minutes before the new trial order was docketed. The district

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[1] The basis for the new trial order was the district court's failure to give an entrapment instruction. Mar. 9, 1992, Tr. 9-18.

court held that, in those circumstances, its March 19 written order granting a new trial was tantamount to a denial of the March 23 motion for reconsideration. The court then ordered that the second trial commence at once. Pet. App. 2-3.

The government immediately filed a notice of appeal pursuant to 18 U.S.C. 3731, and an emergency motion to stay the retrial. The district court expressed the view that the notice of appeal was untimely because more than 30 days had elapsed since its order granting a new trial was docketed on March 23. The court refused to delay the trial and immediately impaneled a jury. That same day, May 11, the court of appeals granted a temporary stay of the trial. Pet. App. 3, 10-13.

2. On May 18, following briefing by both parties of the jurisdictional issue, the court of appeals granted the government's motion to stay proceedings in the district court pending the disposition of the government's appeal of the new trial order. Pet. App. 1-9. The court first rejected petitioner's claim that the government's March 23 reconsideration motion was ineffectual because it was filed minutes before the March 19 written order granting a new trial was docketed. The court relied on Rule 4(b), Fed.R.App. P., which provides that a "notice of appeal filed after the announcement of a[n] * * * order but *before* entry of the * * * order *shall be treated as filed after such entry and on the day thereof.*" Pet. App. 5. Accordingly, the court of appeals concluded that, "under the express terms of Fed. R. App. P. 4(b), the government was entitled to file a notice of appeal from the district court's grant of [petitioner's] motion for a

new trial or to file a motion for reconsideration directed at that ruling as soon as the district court announced it." *Id.* at 6.

Because the government's March 23 reconsideration motion was filed within 30 days of the district court's March 9 announcement of the order granting the new trial motion, the court held that it tolled the time for filing a notice of appeal. The court of appeals further held that the district court did not deny the reconsideration motion until May 11 (when it issued its order erroneously stating that it had denied the motion in its March 19 order), and that the government timely filed its notice of appeal within 30 days of that date. Pet. App. 6-8.

The court then held that the timely filing of a notice of appeal divested the district court of jurisdiction before it impaneled the jury. The court accordingly granted the government's motion to stay any proceedings in the district court pending resolution of the government's appeal. Pet. App. 8-9.

ARGUMENT

Petitioner argues (Pet. 5-8) that the filing of the government's notice of appeal did not divest the district court of jurisdiction to proceed with the retrial.[2] That claim is without merit and does not warrant review by this Court.

1. With limited exceptions, the filing of a notice of appeal divests the district court of jurisdiction over those aspects of the case involved in the appeal. *Griggs* v. *Provident Consumer Discount Co.*, 459

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[2] Petitioner does not challenge the court of appeals' ruling that the government's notice of appeal was timely filed.

U.S. 56, 58 (1982) (per curiam). See also *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985); *Berman* v. *United States*, 302 U.S. 211, 214 (1937); *Wilson* v. *O'Leary*, 895 F.2d 378, 382 (7th Cir. 1990); *United States* v. *Prows*, 888 F.2d 100, 101 (11th Cir. 1989); *United States* v. *Davis*, 856 F.2d 1514, 1516 n.5 (11th Cir. 1988); *United States* v. *Queen*, 847 F.2d 346, 350 (7th Cir. 1988); *United States* v. *Distasio*, 820 F.2d 20, 23 (1st Cir. 1987); *Shewchun* v. *United States*, 797 F.2d 941, 942 (11th Cir. 1986). This general rule is premised on the unremarkable proposition that two courts "should not attempt to assert jurisdiction over a case simultaneously" (*Griggs*, 459 U.S. at 58), and serves to avoid the confusion and waste of time that would result from dual jurisdiction. *Apostol* v. *Gallion*, 870 F.2d 1335, 1337 (7th Cir. 1989); *United States* v. *Salerno*, 868 F.2d 524, 540 (2d Cir.), cert. denied, 491 U.S. 907 (1989); *Shewchun* v. *United States*, 797 F.2d at 943. The general rule is also premised on "considerations of fairness to parties who might otherwise be forced, as a matter of tactics, to fight a 'two front war' for no good reason." *Ibid.*

There are exceptions to the general rule that a case may be in only one court at a time. Thus, it is settled that during the pendency of an appeal the district court retains jurisdiction to proceed with matters in aid of the appeal. *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. at 379; *United States* v. *Joseph*, 914 F.2d 780, 783 n.2 (6th Cir. 1990); *United States* v. *Green*, 882 F.2d 999, 1001 (5th Cir. 1989); *Shewchun* v. *United States*, 797 F.2d at 942; *United States* v. *Hitchmon*, 602 F.2d 689, 692 (5th Cir. 1979)

(en banc). The district court also retains jurisdiction "over questions not presented by the appeal and may take steps that do not present risks of duplicative action." *Wilson* v. *O'Leary*, 895 F.2d at 382 (during pendency of appeal district court may dispose of a request for a certificate of probable cause); *Apostol* v. *Gallion*, 870 F.2d at 1338; *United States* v. *Katsougrakis*, 715 F.2d 769, 776 n.7 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (district court retains jurisdiction during pendency of appeal to impose sanctions for violation of a post-conviction release condition); *United States* v. *Drefke*, 707 F.2d 978, 984 (8th Cir.) (per curiam), cert. denied, 464 U.S. 942 (1983) (district court retains jurisdiction during pendency of appeal to enforce its own judgment concerning a defendant's release status); *United States* v. *Dunbar*, 611 F.2d 985, 989 (5th Cir.) ("[a]fter the filing of a notice of appeal, the trial court retains jurisdiction to modify or grant an injunction pending appeal, to act with regard to appeal and supersedeas bonds, and to aid execution of a judgment that has not been superseded"), cert. denied, 447 U.S. 926 (1980); Fed. R. Crim. P. 36 (district court may correct clerical errors in record at any time).

Similarly, under Fed. R. Crim. P. 33, the district court may consider a motion for a new trial during the pendency of an appeal and either deny the motion or certify to the court of appeals that it would grant the motion on remand. Such limited jurisdiction does not present any risk of duplicative action, and in fact aids the efficient disposition of cases. *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984); *United States* v. *Khoury*, 901 F.2d 975, 976 (11th Cir. 1990); *United*

States v. *DiBernardo*, 880 F.2d 1216, 1224 (11th Cir. 1989); *United States* v. *Goodwin*, 770 F.2d 631, 639 n.3 (7th Cir. 1985), cert. denied, 474 U.S. 1084 (1986); *United States* v. *Palmer*, 766 F.2d 1441, 1445 (10th Cir. 1985).

The courts have also carved out two narrow exceptions allowing a district court to proceed to trial even after a notice of appeal has been filed. Thus, it is settled that when a defendant takes an interlocutory appeal from an order denying his motion to dismiss on double jeopardy grounds, the district court may proceed with the trial if it finds that the appeal is frivolous. *United States* v. *Brown*, 926 F.2d 779, 781 (8th Cir. 1991); *United States* v. *Salerno*, 868 F.2d at 539 (citing cases); *United States* v. *Byrski*, 854 F.2d 955, 956 n.1 (7th Cir. 1988); *United States* v. *Grabinski*, 674 F.2d 677, 679 (8th Cir.) (en banc) (per curiam), cert. denied, 459 U.S. 829 (1982); *United States* v. *Farmer*, 923 F.2d 1557, 1565 (11th Cir. 1991); *United States* v. *Dunbar*, 611 F.2d at 988.[3] Similarly, the district court retains jurisdiction to proceed with the merits of the case if a defendant takes an interlocutory appeal from an unappealable order. *United States* v. *Green*, 882 F.2d at 1001; *United States* v. *Hitchmon*, 602 F.2d at 691, 694. The courts have reasoned that to divest the district court of jurisdiction to proceed in those two instances would render the district courts powerless to prevent intentional "dilatory tactics." *United States* v. *Grabinski*, 674 F.2d at 679. See also *United States* v. *Brown*, 926

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[3] In that situation, the appellate court can grant a stay of the trial if it regards the appeal as non-frivolous. *United States* v. *Dunbar*, 611 F.2d at 988-989.

F.2d at 781; *United States* v. *Hitchmon*, 602 F.2d at 694.

Petitioner's case does not fall within any of the exceptions to the general rule. Petitioner was tried and convicted. After the district court granted a motion for a new trial, the government filed a timely notice of appeal. The government's appeal is not a dilatory tactic—the government seeks, as 18 U.S.C. 3731 authorizes, to preserve the jury's verdict and avoid an unnecessary second trial. Nor does the court's retrial order aid the court of appeals in any way. And if the court of appeals should hold that petitioner's motion for a new trial was granted improperly, a retrial would be a wasted effort. It is true that the government's appeal will delay a second trial, should one be required. But there is no apparent basis for petitioner's suggestion that his speedy trial rights are implicated by the government's appeal and the court of appeals' stay order. Even if there is some basis for such a claim, petitioner can advance it after the completion of the proceedings in the court of appeals. The issue before this Court is whether the district court retained jurisdiction to proceed with a second trial after the government had appealed from an order granting a retrial.

2. Petitioner argues that the ruling below conflicts with the decisions of the Ninth Circuit in *United States* v. *Gatto*, 763 F.2d 1040 (1985), and *United States* v. *Cox*, 475 F.2d 837 (1973). There is no conflict between the decision below and the Ninth Circuit's decisions in those cases.

In *Cox*, the district court granted a pretrial motion to suppress government evidence, and the government filed a timely notice of appeal from the order. While the appeal was pending, the district court granted the defendant's motion to dismiss the indictment, out of concern that the delay occasioned by the appeal might violate the defendant's Sixth Amendment speedy trial rights. The court of appeals upheld the suppression order. Then, after stating only that "given the circumstances of this case, we do not feel the district court erred," the court summarily affirmed the dismissal order. 475 F.2d at 841.

In *Gatto*, the district court entered a pretrial order suppressing government evidence. The government took an immediate appeal from the order, and unsuccessfully sought to stay commencement of the trial. On the day trial was to begin, the government refused to proceed, and the district court dismissed the indictment with prejudice pursuant to Fed. R. Crim. P. 48(b), based on unnecessary delay in bringing the defendant to trial. On appeal, the court reversed both the suppression and dismissal orders. The court rejected the government's contention, however, that the district court lost jurisdiction over the action once the government filed its notice of appeal to challenge the suppression order. Citing *United States* v. *Emens*, 565 F.2d 1142, 1144 (9th Cir. 1977), and *Cox*, 475 F.2d at 841, the court held that "a district court retains 'the naked power, in appropriate cases, to dismiss an indictment' while a section 3731 appeal from a pretrial order is pending." 763 F.2d at 1049. The court found, however, that the district court had abused its discretion by dismissing the

indictment because the delay was necessary to protect the government's right to appeal the suppression of substantially material evidence. 763 F.2d at 1050.

While we disagree with the Ninth Circuit's conclusion that a district court retains jurisdiction to dismiss an indictment after the government has filed a notice of appeal from a suppression order, *Cox* and *Gatto* do not aid petitioner. The district court in this case did not dismiss the indictment on the ground that the time required for disposition of the appeal would infringe petitioner's speedy trial rights. Rather, the district court granted petitioner's motion for a new trial and attempted to proceed with the retrial. Nothing in *Cox* or *Gatto* suggests that the district court retains jurisdiction to proceed with a retrial, as the court of appeals below recognized by distinguishing those cases. Pet. App. 8 n.2.

Moreover, the holding in *Gatto* that the district court possessed jurisdiction to dismiss an indictment should be of limited practical importance, since the Ninth Circuit went on to hold that the district court abused its discretion by dismissing the indictment. Thus, even if the Ninth Circuit were to hold that a district court had the "naked power" to proceed with a retrial, it would be an abuse of discretion under *Gatto* for the district court to go forward with a retrial while the government's appeal was pending, since a retrial could result in wasted effort.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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